



July 5, 2000

Ms. Sandra Zimmerman
Assistant City Attorney
City of Austin
P O Box 1546
Austin , Texas 78767-1546

OR2000-2518

Dear Ms. Zimmerman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 136737.

The City of Austin (the "city") received a request for "all information available regarding a finished contract with the Police Department, pertaining [to] the evaluation of the bilingual capabilities of the Police Officers." The city does not argue that the information requested is excepted from disclosure. However, you have notified the third party whose interests are at issue, in accordance with section 552.305 of the Government Code, in order to allow him to establish the applicability of an exception to required public disclosure. *See* Open Records Decision No. 542 (1990).

Spanish Language Instruction (SLI) did submit arguments asserting that portions of the information are excepted from disclosure based on section 552.110 of the Government Code. Section 552.110 excepts from required disclosure:

- (a) A trade secret obtained from a person and privileged or confidential by statute or judicial decision [.]
- (b) Commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained [.]

This section protects two categories of information: 1) trade secrets and 2) commercial or financial information. A "trade secret":

may consist of any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939) (emphasis added). *See also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980); 232 (1979); 217 (1978).

The determination of whether any particular information is a trade secret is a determination of fact. *See Open Records Decision Nos. 552 at 2, 5 (1990) (party must establish prima facie case that information is trade secret), 542 at 3 (1990)*. Noting that an exact definition of a trade secret is not possible, the Restatement lists six factors to be considered in determining whether particular information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business];
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information; [and]
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.¹

Open Records Decision No. 552 (1990) noted that the attorney general is unable to resolve disputes of fact regarding the status of information as "trade secrets" and must rely upon the facts alleged or upon those facts that are discernible from the documents submitted for

¹RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App. -Austin 1999, pet. filed).

inspection. For this reason, the attorney general will accept a claim for exception as a trade secret when a prima facie case is made that the information in question constitutes a trade secret and no argument is made that rebuts that assertion as a matter of law.²

We have reviewed the arguments made by SLI and believe that SLI has not made a prima facie case that the information it seeks to withhold is excepted from required public disclosure under section 552.110. The uniqueness of the scoring guidelines developed by SLI is not sufficient basis to support a claim of trade secret, nor is the statement that release of the guidelines would benefit competitors or “culminate in [SLI’s] inability to do business in the marketplace” sufficient to support a claim that disclosure of the information would result in substantial competitive harm. The commercial or financial prong of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would result from disclosure. *See* Open Records Decision Nos. 661 at 5-6 (1999), 552 at 5 (1990). The city must release the requested information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one

²Open Records Decision No. 552 at 5 (1990).

of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Patricia Michels Anderson
Assistant Attorney General
Open Records Division

PMA/pr

Ref: ID# 136737

Encl. Submitted documents

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(w/o enclosures)

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